A

## GENNEVA MALAYSIA SDN BHD v. TIO JIT HONG & ORS

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
HANIPAH FARIKULLAH JCA
KAMALUDIN MD SAID JCA
B [CIVIL APPEAL NO: B-02(IM)(NCC)-542-03-2019]
28 JANUARY 2020

C ***CONTRACT:*** *Breach – Unwritten contract – Purchase of gold – Company failed to deliver gold to purchasers – Claim by purchasers against company for return of monies – Whether customer purchase order mere offer to purchase – Whether there was contract between purchasers and company – Whether contract by conduct – Whether company breached contract – Company's bank account frozen and seized under Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Whether purchasers obtained consent of Public*
D *Prosecutor to commence action against company – Whether purchasers' claim made within prescribed period*

***CIVIL PROCEDURE:*** *Summary judgment – Application for – Purchase of gold from company – Company failed to deliver gold to purchasers – Claim by purchasers for return of monies – Whether purchasers had clear and undeniable claim –*
E *Whether there were triable issues to be tried – Whether company had defence to raise – Rules of Court 2012, O. 14*

***LIMITATION:*** *Laches – Doctrine of – Purchase of gold from company – Company failed to deliver gold to purchasers – Claim by purchasers for return of monies –*
F *Allegation that purchasers filed claim almost six years after date of breach by company without any explanation for long delay – Whether purchasers' claim statute-barred – Limitation Act 1953*

The respondents ('plaintiffs') had entered into contracts with the appellant ('defendant') to buy from and/or sell gold to the defendant. According to the
G plaintiffs, they (i) deposited the purchase sums into the defendant's bank account but the defendant failed to deliver the gold; and (ii) sold gold to the defendant but the defendant failed to make the payment. This prompted the plaintiffs to file an application for summary judgment at the High Court, pursuant to O. 14 of the Rules of Court 2012 ('ROC'), for the refund of money, on the grounds that the defendant had no defence against the
H plaintiffs' claim and there were no issues to be tried ('encl. 8'). The defendant objected to the appeal, on the grounds that it had defences and there were issues to be tried, but the High Court Judge ('HCJ') allowed encl. 8. Dissatisfied, the defendant filed the present appeal based on the argument that the case was not suitable to be decided under O. 14 of the ROC and
I should be reverted back to the High Court for a full trial. In support of its appeal, the defendant submitted that (i) the customer purchase order ('CPO')

were mere offers to sell gold to the defendant; (ii) the CPO contained a clause declaring that the CPO would not bind the defendant until it was accepted in writing by the defendant; (iii) none of the plaintiffs adduced any evidence of the acceptance by the defendant and, therefore, there was no evidence of any binding contract between the plaintiffs and the defendant; (iv) the plaintiffs were claiming for the refund of their monies paid to the defendant, which was restitution, but the monies have been frozen under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFAPUA'); (v) for a claim of restitution, s. 54(3) of the AMLATFAPUA requires the plaintiffs to obtain the consent of the Public Prosecutor; (vi) the consent that the plaintiffs obtained from the Public Prosecutor was only for their claim for breach of contract, and not for restitution; (vii) the plaintiffs filed the claim almost six years after the date of the alleged breach by the defendant without any explanation for the long delay; (viii) the second to fifth plaintiffs have not tendered any evidence of delivery of gold that they alleged to have been sold to the defendant; and (ix) the customer purchase bill tendered by the sixth plaintiff was not clear evidence of delivery of gold to the defendant. The issues that arose for adjudication were (i) whether there was a triable issue; (ii) whether the plaintiffs had a clear and undeniable claim; and (iii) whether the plaintiffs' claim was statute-barred.

**Held (dismissing appeal with costs)**
**Per Kamaludin Md Said JCA delivering the judgment of the court:**

**(1)** Apart from writings, conduct of parties may amount to acceptance. The defendant's conduct, having accepted the offers which were followed by payments into the defendant's bank account and some by partly giving gold at an agreed value and using them for the defendant's benefit, was consistent with having accepted the offers made by the plaintiffs. By the defendant's own conduct, the defendant was estopped from denying that there was a valid and binding contract between the defendant and the plaintiffs. (paras 50 & 54)

**(2)** The Public Prosecutor had given the consent for the plaintiffs to initiate a civil claim against the defendant for the amount claimed for. The plaintiffs had, therefore, obtained the requisite consent, under s. 54(3) of the AMLATFAPUA and commenced this action after obtaining such consent. Therefore, the consent issue raised by the defendant was clearly not a triable issue. (para 59)

**(3)** There was a shift now, from the pleading of filing close to limitation period, to after limitation period. The claim was made well within the period prescribed by the law. The defendant's only substantive defence was the seizure under the AMLATFAPUA where the defendant's bank account was frozen by an order from Bank Negara Malaysia ('BNM') on

1 October 2012 and the Public Prosecutor on 21 December 2012. However, the claim by the plaintiffs were not for the properties under seizure. The seizure did not affect the defendant's liability to the plaintiffs. (para 62)

**(4)** Limitation to bring an action is provided under the Limitation Act 1953. As long as the plaintiffs' cause of action is still within the permitted time, the principle of laches does not apply. The issue of laches was not an issue that merited a full trial. (para 63)

**(5)** The plaintiffs' respective affidavits proved that the plaintiffs bought the gold from the defendant by producing the CPO and payment by cheques paid into the defendant's bank account. The affidavits sufficiently established that the defendant had accepted the payment for the gold transactions or accepted the gold sold to the defendant but failed to carry out its responsibility under the contract. The defendant must refund the monies paid or return the gold back to the plaintiffs. Even if the gold belonging to the first to fourth and sixth plaintiffs were seized by BNM, the defendant was still responsible to refund the value of the gold to the plaintiffs. (paras 65 & 67)

**(6)** There was no triable issue in the plaintiffs' application for a summary judgment on the claim against the defendant that merited a full trial. The decision of the High Court was affirmed. (para 68)

**Case(s) referred to:**

*Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC* ***(refd)***

*Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC* ***(refd)***

*Dato' Zahari Sulaiman v. Genneva Sdn Bhd [2011] 6 CLJ 219 HC* ***(refd)***

*Daud Mohamad & Ors v. Genneva Malaysia Sdn Bhd & Ors (Civil Suit No. 22NCVC-1490-12-2012) (Unreported)* ***(refd)***

*Eckhardt Marine GMBH v. Sheriff Mahkamah Tinggi Malaya & Ors [2001] 3 CLJ 864 CA* ***(refd)***

*Genneva Malaysia Sdn Bhd v. Abdul Ghani Sher Mohamad [2018] 5 CLJ 472 HC* ***(refd)***

*JNA Ikhtisas Sdn Bhd v. Kerajaan Malaysia [2015] 3 CLJ 1100 HC* ***(refd)***

*Kiwi Brands (Malaysia) Sdn Bhd v. Multiview Enterprises Sdn Bhd [1998] 2 CLJ Supp 194 HC* ***(refd)***

*Lim Chiew v. Lee Chao Yong & Anor And Another Appeal [2018] 1 LNS 1025 CA* ***(refd)***

*Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC* ***(refd)***

*Nowran Begam Mohamed Saliff v. Nantha Kumar Devar Sangaran & Anor; CTRM Aviation Sdn Bhd (Third Party) [2016) 7 CLJ 760 HC* ***(refd)***

*TAC Construction & Trading v. Bennes Engineering Bhd [1999] 2 CLJ 117 HC* ***(refd)***

*UNP Plywood Sdn Bhd v. HSBC Bank Malaysia Bhd [2010] 5 CLJ 177 CA* ***(refd)***

**Legislation referred to:**
Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, ss. 50(1), 54(3)
Interpretation Acts 1948 and 1967, s. 17A
Rules of Court 2012, O. 14

*For the appellant - Hargopal Singh; M/s M Sujata & Assocs*
*For the respondents - Paari Perumal & K A Ch'ng; M/s Chai & Partners*

*[Editor's note: Appeal from High Court, Shah Alam; Civil Suit No: BA-22NCC-43-07-2018 (affirmed).]*

*Reported by Najib Tamby*

## JUDGMENT

**Kamaludin Md Said JCA:**

### Introduction

**[1]** By notice of appeal dated 19 March 2019, the appellant appealed against the whole decision of the learned High Court Judge (the learned judge) delivered on 1 March 2019 which allowed the respondents' application for summary judgment under O. 14 of the Rules of Court 2012 (ROC 2012) for the refund of money (restitution) at para. 77(l) (i) to (ix) of the statement of claim dated 25 July 2018. The appellant was also ordered to pay interest of 5% on the amount awarded to each and every respondent based on the date of customer purchase orders and customer purchase bill.

**[2]** We heard the appellant's appeal on 3 October 2019 and after perusal of the record of appeal and considered the oral submissions and written submissions of the appellant and the respondents, we found there is no merit in the appellant's appeal. We dismissed the appeal with costs of RM10,000 against the appellant subject to allocator fee.

**[3]** The appellant herein was the defendant whereas the respondents named herein were the plaintiffs. The parties shall be referred to as they were in the court below.

### Background Facts

**[4]** The defendant is a company that was engaged in the trade of buying and selling gold bullion.

**[5]** The plaintiffs are individuals.

**[6]** The plaintiffs allege that they entered into contracts with the defendant to buy gold from and/or sell gold to the defendant.

**[7]** The plaintiffs claim that they deposited the purchase sums into the defendant's account with CIMB Islamic Bank Account No. 14560000662104 but the defendant failed to deliver the gold to them.

**[8]** The plaintiffs also claim that they sold gold to the defendant but the defendant failed to pay for the said gold.

**Application Under O. 14 ROC 2012**

**[9]** Plaintiffs' filed application for summary judgment dated 28 September 2018 in encl. 8 supported by affidavits affirmed by the first to seventh plaintiffs on 27 September 2018 and by the eighth and ninth plaintiffs on 28 September 2018 respectively.

**[10]** In the statement of claim, at para. 77(b) to (k), the plaintiffs claim against the defendant the payment of monies owed to them or alternatively, payment by restitution at para. 77(l)(i) to (ix). The amounts claim are all based on receipts of customer purchase orders and customer purchase bill (CPO and CPB). (See: statement of claim at pp. 46 and 47 Rekod Rayuan Bahagian A&B).

**[11]** In the application for summary judgment, encl. 8 (at pp. 64 to 157 of Rekod Rayuan Bahagian A&B), the plaintiffs averred that the defendant had not paid the arrears of payment and the amount is still owed to the plaintiffs; the defendant has no defence to the amount claimed by the plaintiffs and there is no issues to be tried to the plaintiffs' claim.

**[12]** The defendant opposed to the application by filing its affidavit in reply affirmed on 19 October 2018 (at pp. 158 to 182 of Rekod Rayuan Bahagian A&B) amongst others averred the same defence as raised in the statement of defence and based on the defence, the defendant argued that there are three issues to be tried related to the existence of contract between the plaintiffs and the defendant, that is the restriction imposed under the Anti-Money Laundering Act 2001 (AMLA) and laches. It was the defendant's case that the three issues ought to be determined in a full trial basis.

**Defendant's Submission**

**[13]** The defendant submitted that there is no contract because there is no written acceptance by the plaintiffs. For the defendant, the CPO are mere offers to sell gold to the defendant. All the CPO contain a clause "I/We hereby declare that I/we am/are aware that this order does not bind GENNEVA until it is accepted in writing by GENNEVA". However, none of the plaintiffs adduced any evidence at all of the acceptance by the defendant. Therefore, there is no evidence of any binding contract between the plaintiffs and the defendant.

**[14]** The defendant relied on the High Court case of *Genneva Malaysia Sdn Bhd v. Abdul Ghani Sher Mohamad* [2018] 5 CLJ 472; [2017] MLJU 1819 where the facts were similar to those in the present case and the learned judge held as follows:

[24] Based on the circumstances of this instant appeal before me, it is my respectful view that the arguments of the Plaintiff, though well argued, do not hold water and cannot be sustained. My reasons are these. The starting point is the CPO relied on by the Plaintiff is only an offer to purchase. This is crystal clear from the express wordings of the CPO highlighted by the Defendant such as:

(a) Heading: 'Customer Purchase Order'.

(b) Legend: I/We hereby declare that 1/we am/are aware that this offer does not bind GENNEVA **until it is accepted in writing by GENNEVA.**

(c) Clause: I hereby acknowledge receipt of the buyer's order (emphasis added)

[29] Learned Defendant Counsel submitted "This present case should be decided on its peculiar facts where it is clear that the Customer Purchase Order was only an offer and shall not bind the Defendant until it is accepted in writing (by way of a sale and purchase agreement).

I find there is much force in the submission of the Defendant as it is my respectful view that the Defendant's case is a case where the Condition for acceptance clause of "I/We hereby declare that we are aware that this offer does not bind GENNEVA until it is accepted in writing GENNEVA" falls under the 1st category, to borrow the words of *Von Hatzfeldt-Wildenburg*'s case (which was advocated by the Federal Court in *Lim Keng Siong*'s case), is "a condition or term of the bargain and not under the 2nd category of" a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through, the argument canvassed by the Plaintiff.

[30] For the reasons given above, with respect I disagreed with the Plaintiffs submission that a contract to purchase gold was formed on 20/9/2012 and the signing of the formal sale and purchase agreement was a mere formality. By the same token I find the learned SCJ has erred in her finding that a valid contract to purchase the gold had come into existence on 20/9/2012.

**[15]** Therefore, the learned judge erred in not considering the said clause in the customer purchase orders.

**[16]** Further, it was argued that alternatively, the plaintiffs are claiming for refund of their monies paid to the defendant, that is, restitution. Their claim is therefore for refund of the monies that they alleged to have been deposited into the defendant's account with CIMB Islamic Bank Account No. 14560000662104. The monies in this account have been frozen under s. 50(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLA"). For this claim of restitution, s. 54(3) of AMLA requires them to obtain the consent of the Public Prosecutor. However, the consent that the plaintiffs have obtained

from the Public Prosecutor is only for their claim for breach of contract (that is, the contracts of sale and purchase of gold) between the plaintiffs and the defendant and not for restitution.

**[17]** The learned High Court Judge erred in failing to consider that the plaintiffs have not obtained the consent of the Public Prosecutor as required under s. 54(3) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLA").

**[18]** Section 54(3) AMLA provides as follows:

> (3) For so long as a seizure of any property under this Act remains in force, no action, suit or other proceedings of a civil nature shall be instituted, or if it is pending immediately before such seizure, be maintained or continued in any court or before any other authority in respect of the property which has been so seized, and no attachment, execution or other similar process shall be commenced, or if any such process is pending immediately before such seizure, be maintained or continued, in respect of such property on account of any claim, judgment or decree, regardless whether such claim was made, or such judgment or decree was given, before or after such seizure was effected, except at the instance of the Federal Government or the Government of a State, or at the instance of a local authority or other statutory authority, or except with the prior consent in writing of the Public Prosecutor.

**[19]** In another High Court case of *Daud bin Mohamad & 8 Ors. v. Genneva Malaysia Sdn Bhd & 4 Ors.* (Kuala Lumpur High Court Civil Suit No. 22NCVC-1490-12-2012) where the facts were similar to the present case. The learned judge held as follows:

> [6] The 1st Defendant's main argument is that this suit is statutorily barred, as the prior written consent of the Public Prosecutor pursuant to section 54(3) AMLA has not been obtained. Counsel for the 1st, 2nd, 3rd and 5th Defendants ("Defendants' claim counsel") submits that the lack of consent is fatal to the Plaintiffs' claim herein as such a claim is prohibited under section 54(3) of AMLA. I find merit in that submission for the following reason.
>
> [7] Now, section 44(1) and (2) of AMLA states that:
>
> > (1) Subject to section 50, where an enforcement agency, having the power to enforce the law under which a serious offence is committed, has reasonable grounds to suspect that an offence under subsection 4(1) or a terrorism financing offence has been, is being or is about to be committed by any person, it may issue an order freezing any property of that person or any terrorist property, as the case may be, wherever the property may be, or in his possession, under his control or due from any source to him.

(2) An order under subsection (1) may include – A

(a) an order to direct that the property, or such part of the property as is specified in the order, is not to be disposed of, or otherwise dealt with, by any person, except in such manner and in such circumstances, if any, as are specified in the order; and

(b) an order to authorise any of its officers to take custody and control of the property, or such part of the property as is specified in the order if the enforcement agency is satisfied that the circumstances so require. B

[8] The 1st Defendant has produced an order dated 1.10.2012 issued by the Bank Negara Malaysia under section 44 of AMLA ("the 1st Order") (pages 71-74 of 25 Bundle I) freezing the monies of the 1st Defendant's bank accounts. This would include CIMB Bank Account Number 14560000662104 of the 1st Defendant into which the Plaintiffs allege having paid or deposited their monies ("the CIMB Account"), which monies they now claim under this suit. The 1st Order also restrains the 1st Defendant from disposing or dealing with any of its property. I agree with submissions of Defendants' counsel that the 1st Order under section 44 of AMLA has the effect of freezing the monies in all the 1st Defendant's bank accounts and is prohibited from making any payment out of any of its bank accounts. The 1st Order was valid for a period of 90 days from the date of the Order. C D E

[9] Subsequently, a further order was issued on 18.12.2012 by the Public Prosecutor under the provisions of section 50(1) of AMLA (pages 75-77 of Bundle 1) freezing the monies in the 1st Defendant's bank accounts including the CIMB Account. Section 50(1) of AMLA reads:

(1) Where the Public Prosecutor is satisfied on information given to him by an investigating officer that any movable property, including any monetary instrument or any accretion to it, which is the subject-matter of an offence under subsection 4(1) or a terrorism financing offence or evidence in relation to the commission of such offence or which is terrorist property, is in the possession, custody or control of a financial institution, he may, notwithstanding any other law or rule of law, after consultation with Bank Negara Malaysia, the Securities Commission or the Labuan Offshore Financial Services Authority, as the case may be, by order direct the financial institution not to part with, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied. F G

[10] The 1st and 2nd Orders have a further effect as provided in section 54 of AMLA that reads: H

Where any property has been seized under this Act, and long as such seizure remains in force, any dealing effected any person or between any persons in respect of such property, except any dealing effected under this Act by an officer of a public body in his capacity as such officer, or otherwise by or on behalf of the Federal Government, or the Government of a State, or a local authority or other statutory authority, shall be null and void, and shall not be registered or otherwise be given effect to by any person or authority, I

(2) Subsection (1) shall be in addition to and not in derogation of subsections 51(3) and (4).

(3) For so long as a seizure of any property under this Act remains in force, no action, suit or other proceedings of a civil nature shall be instituted, or if it is pending immediately before such seizure, be maintained or continued in any court or before any other authority in respect of the property which has been so seized, and no attachment, execution or other similar process shall be commenced, or if any such process is pending immediately before such seizure, be maintained or continued, in respect of such property on account of any claim, judgment or decree, regardless whether such claim was made, or such judgment or decree was given, before or after such seizure was effected, except at the instance of the Federal Government or the Government of a State, or at the instance of a local authority or other statutory authority, or except with the prior consent in writing of the Public Prosecutor.

[11] There is specific reference in both the 1st and 2nd Orders to the CIMB Account. In the 1st Order that reference is found in the Attachment to the order where the CIMB Account is specifically referred as being affected by the Order. And in the 2nd Order it is found in the body of the Order itself. It would be useful to reproduce the relevant part of the 2nd Order for ease of reference.

To:

CIMB ISLAMIC BANK BERHAD
Head Office Kuala Lumpur

WHEREAS I, ANSELM CHARLES FERNANDIS, Deputy Public Prosecutor being satisfied on the information given to me by HUSEIN BIN ZAKARIA Investigating officer that the moveable property including any monetary instrument or any accretion to it, as set out below:

...

(vi) GENNEVA MALAYSIA SDN BHD (BUSINESS REG. NO. s92s76-A) Current Account No. 14560000662104 ...

is the subject matter of an offence under subsection 4(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (the Act) or evidence in relation to the commission of such offence.

NOW PURSUANT to subsection 50(1) of the Act, it is hereby ordered that you, your employee or your agent are not to part with, deal in, or otherwise dispose of such property or any part of it until this Order is otherwise revoked or varied.

TAKE NOTICE THAT failure to comply with this Order is an offence under the Act.

Dated: 18 December 2012 (Signed)

Deputy Public Prosecutor

[12] From a reading of section 54 of AMLA it is clear that so long as a seizure of any property under this AMLA remains in force, no action/suit or other proceedings of a civil nature shall be instituted, or if it is pending immediately before such seizure, be maintained or continued in any court or before any other authority in respect of the property which has been so seized. At the time of institution of this suit and the trial of the action, the 2nd Order was still subsisting and therefore, the freezing of the 1st Defendant's CIMB Account was effective and in force.

[13] The Plaintiffs have not obtained the requisite prior consent of the Public Prosecutor, as required under section 54(3) of AMLA. As such I find that the institution of this suit is contrary to the prohibition under the said section 54(3) of AMLA and the action cannot be maintained.

**[20]** In the case of *Genneva Malaysia Sdn Bhd v. Abdul Ghani bin Sher Mohamad* (*supra*) the High Court referred to the case of *Daud bin Mohamad & 8 Ors v. Geneva Malaysia Sdn Bhd & 4 Ors* (*supra*) and held as follows:

[47] With respect I am persuaded by the Defendant's argument that the Plaintiffs' claim is premature and/or statute-barred for non-compliance of s. 54(3) of the AMLATFA as the Plaintiff has not obtained the Public Prosecutor's consent to file this suit and its reliance on the decision of Vazeer Alam Mydin Meera JC (as he then was) in the case of *Daud bin Mohamad & 8 Ors. v. Geneva Malaysia Sdn Bhd & 4 Ors*., KLHC Civil Suit No. 22NCVC-1490-12/2012 dated 30/4/2014. My reasons are these.

[48] I find the Plaintiffs submission that its claim is not against the seized assets but is for a breach of contract is with respect misconceived. It is my finding that there is no established contract. What the Plaintiff is in fact seeking (though not pleaded in that manner) is for the refund of the money which according to SP4 was deposited by the Plaintiff into the Defendant's bank account, CIMB Account no: 14560000662104. The Orders dated 1/10/2012 under s. 44 AMLATFA and Order dated 18/12/2012 under s. 50 AMLATFA showed that the monies in the CIMB Account have been frozen and have been seized. This will become apparent when I refer to the relevant parts of Vazeer JC's judgment in *Daud bin Mohamad*'s case.

[49] In my view the Defendant's reliance on *Daud bin Mohamad*'s case is appropriate as the facts of the present case is somewhat similar to the former. In *Daud bin Mohamad*'s case (*supra*) the plaintiffs were customers of the 1st defendant and had entered into individual contracts to invest in a gold investment scheme operated by the 1st defendant. 2nd to 3rd defendants were directors of the 1st defendant. The 1st defendant marketed and promoted the gold investment scheme as being syariah compliant. The plaintiffs alleged that they have individually paid monies to the 1st defendant to purchase the gold and invest in the scheme and that the gold was never delivered to them. The plaintiffs, amongst others, are seeking the refund of the monies they allege that they have paid to the 1st defendant and monies worth for the gold that they surrendered as part of the renewal of their investment with the 1st defendant.

**[21]** Finally, it was argued that the learned judge also erred by not considering the delay in filing this suit. In this case, the plaintiffs filed this suit almost six years after the date of the alleged breach by the defendant without any explanation for the long delay.

**[22]** In the case of *Lim Chiew v. Lee Chao Yong & Anor And Another Appeal* [2018] 1 LNS 1025, the Court of Appeal held as follows:

> [31] It is trite, that inordinate delay without explanation, is in itself fatal to the application under section 279 of the RCA. This was held by Ramly Ali J, (now FCJ), in *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 7 CLJ 516, where the Court in dismissing an application under section 279 of the RCA, at para 94, 95 and 5 96, pages 549 to 550 held: "[94] There was clear delay in the filing of encl. 37. Enclosure 37 was only filed on 27 December 2005 where evidence suggests that the applicant knew of the sale of the said land at least as early as 20 August 2004. [95] No reasons have been proffered by the 1st Respondent to explain a delay of almost one and a half years. Such a delay would be in itself, be grounds to refuse encl. 37. In the *Leon* case (*supra*). Plowman J held "another ground for refusing the relief for which the plaintiff is asking in this motion is the matter of delay. It is clear from the evidence that the plaintiff knew before Christmas, 1965 the writ was not issued until Mar. 1, that is to say, after a delay of over two months ..." [96] As was the state of affairs in the *Leon* case (*supra*), the liquidator here was dependent on the approval of HSBC in the sale of the said land. The fact that the said land was leasehold land exacerbated the issue, calling for the said land to be sold as soon as possible. The decision was made and the SPA was signed on 3 June 2003 with the consent of HSBC. It is therefore unreasonable for the applicant to have now awakened from his slumber over two and a half years later to begin to question and interfere with that decision with hindsight."
>
> [32] Further, in the case of *Choong Howei v. Cheah Chao Eng & Ors And Another Appeal* [2015] 9 CLJ 689, the Court of Appeal at para 44 held as follows: "[44] A local authority on the principle on laches can be found in *Alfred Templeton & Ors v. Mount Pleasure Corp Sdn Bhd* [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219; [1989] 2 MLJ 202 where Edgar Joseph Jr J of the High Court of Penang held:
>
> Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such a delay as to amount to laches *the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put*

*the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: 14 Halsbury's Laws of England* (3rd Ed) paras 1181, 1182. Laches has been succinctly described as 'inaction with one eye's open'. (emphasis added)

[33] Thus the learned Judge erred, when she made a finding that there was no delay by Lee Chao Yong when he filed Motion 97, as the facts clearly showed that there was at least a delay of 2 years 7 months when Motion 97 was filed, which delay was not explained by Lee Chao Yong.

**[23]** The learned judge also erred when the Lordship failed to appreciate that the second, third, fourth and fifth plaintiffs have not tendered any evidence of delivery of the gold that they alleged to have sold to the defendant.

**[24]** The first plaintiff has tendered a customer sales form and a customer purchase bill as evidence of sale of gold to the defendant whereas the sixth plaintiff has tendered only a customer purchase bill. There is no clear evidence of delivery of the gold to the defendant.

**[25]** Therefore, it was submitted that the defendant has a defence on merits and there are several triable issues. This case is not suitable to be decided under O. 14 of ROC 2012 and this matter should be reverted to the High Court for full trial.

**Plaintiffs' Submission**

**[26]** The plaintiffs on the other hand submitted that the defendant's argument that there is no contract because there is no written acceptance by the plaintiffs is misconceived. It is the plaintiffs' argument that the law is trite that apart from writings, conduct of parties may amount to acceptance.

**[27]** All the customer purchase orders are offers made by the plaintiffs. These offers were followed by payments into the defendant's bank account and some by partly giving gold at an agreed value ("the payments"). The defendant accepted the payments. The defendant did not reject the payments. The defendant did not return the payments. Instead the defendant kept the payments and used them to the defendant's benefit ("the conduct"). At the same time, the plaintiffs were not given what was promised for the said payments.

**[28]** The defendant's conduct described above is consistent with having accepted the offers made by the plaintiffs.

**[29]** Therefore, it was submitted that there is acceptance of the offer. This issue is not a triable issue.

**[30]** Since the consideration of the promise by the defendant is to deliver gold to the plaintiffs which was not delivered, the plaintiffs are entitled to be paid the payments they made to the defendant.

**[31]** On the second issue, the plaintiffs submitted that the appellant is under the mistaken belief that the plaintiffs are claiming for the monies or gold that have been seized under Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLA").

**[32]** Section 54(3) of AMLA stipulates that "for so long as a seizure of any property under this Act remains in force, no action, suit or other proceedings of a civil nature shall be instituted, … in respect of the property which has been so seized, ...". The plaintiffs argued that the plaintiffs' case does not involve or relate to the property seized and as such there is no need for a prior consent in writing of the Public Prosecutor under s. 54(3) of AMLA.

**[33]** However, in abundance of caution, the plaintiffs had obtained the requisite consent under s. 54(3) of AMLA. The consent truly applies only if the claim by the plaintiffs is in respect of the property of the defendant which has been seized.

**[34]** In this regard, the correct interpretation according to the plaintiffs was given in *Dato' Zahari Sulaiman v. Genneva Sdn Bhd* [2011] 6 CLJ 219 by the learned judge in allowing summary judgment to be entered explained as follows:

> [7] Section 54, it is to be observed, is headed "Dealing with property after seizure to be void." It is obvious from this heading, and from the contents of the section, that the reference to action, suit or proceeding of a civil nature **has to be related to the property seized.** ... Section 54(3) cannot be read the way the defendant wants it to be read, for to do so will interfere with the general fundamental right of a citizen to resort to court process and access to justice for the determination of his dispute. ... (emphasis added)
>
> ... Therefore, with all respect due, the defendant's argument is untenable. Section 54(3), as presently worded, cannot be reasonably interpreted as imposing a general restraining order on all suits, actions or proceedings as against all litigants or potential litigants, and irrespective of the properties seized. To read this provision as imposing a kind of restraining order on legal process generally will, in my view, fall foul of s. 17A of the Interpretation Act.

**[35]** Therefore, the consent issue as raised by the defendant is clearly not a triable issue.

**[36]** On the third issue, the plaintiffs stated that the defendant in their statement of defence at para. 42 and affidavit at para. 103 respectively pleaded and affirmed as follows: "Plaintif-Plaintif hanya memfailkan tindakan ini hampir enam tahun dari tarikh transaksi ...". See pp. 59 and 181 of Rekod Rayuan Bahagian A&B. However, in ground 6 of the memorandum of appeal there is a complaint that the claim was filed after six years from the transaction dates (difailkan selepas lebih kurang 6 tahun selepas tarikh transaksi). (See: p. 19 Rekod Rayuan Bahagian A&B). There is a shift now from filing close to limitation period to after limitation period.

**[37]** Be that as it may, the plaintiffs submitted that the plaintiffs' claim have been made well within the prescribed period by law. The learned judge acknowledged this on the grounds of judgment. The plaintiffs argued that the appellant has not shown how they are prejudiced by the claim made by the plaintiffs.

**[38]** It was argued that the defendant's only substantive defence is the seizure under AMLA. But, as pointed out earlier, the claim by the plaintiffs are not for the properties under seizure. The seizure does not affect the defendant's liability to the plaintiffs. In fact, by this defence, it is an acknowledgment by the defendant that if the claims had been made sooner or before the seizure, then the defendant would have refunded the monies and returned the gold to the plaintiffs.

**[39]** The plaintiffs also submitted that the defendant's argument that there is no evidence that the plaintiffs had given gold to the defendant had no merit. This is because in their defence at para. 10 (p. 51 Rekod Rayuan Bahagian A&B), the defendant had stated: "Secara alternatif, saya berkata bahawa sekiranya dakwaan plaintif pertama bahawa beliau telah menyerahkan emas kepada defendan adalah benar (yang mana dinafikan), emas tersebut telah disita oleh Bank Negara Malaysia pada atau sekitar 1 Oktober 2012 dan sehingga kini masih disita dan dalam pegangan Bank Negara Malaysia."

**[40]** The same statement is made for the receipt of gold from the other applicable plaintiffs. In this regard, the defendant cannot have it both ways. The gold concerned is either with the defendant or Bank Negara Malaysia. Either way, it shows that the defendant had prior to the seizure received gold from the plaintiffs as part payment towards purchase price of gold from the defendant.

**[41]** Therefore, it is the plaintiffs' case that there are no triable issues and pray that the appeal be dismissed with costs.

**Our Decision**

**[42]** The procedure for summary judgment is provided under O. 14 of the ROC 2012 which reads as follows:

> Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part thereof except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

**[43]** In this case, there is no dispute that the three conditions under O. 14 ROC 2012 have been fulfilled by the plaintiffs in applying for summary judgment.

**[44]** It is trite law that summary judgment can only be allowed in a plain case with no triable issues to warrant a full trial. An O. 14 application serves the purpose of giving early judgment to a plaintiff who has a clear and undeniable claim. However, it is not intended to shut out a defendant who has a *bona fide* defence (see *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182; [1987] 2 MLJ 183 (SC), *Kiwi Brands (Malaysia) Sdn Bhd v. Multiview Enterprises Sdn Bhd* [1998] 2 CLJ Supp 194 and *TAC Construction & Trading v. Bennes Engineering Bhd* [1999] 2 CLJ 117).

**[45]** In *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14, it was held that:

> Under an O. 14 application, the duty of a judge does not end as soon as a fact asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable.

**[46]** In *UNP Plywood Sdn Bhd v. HSBC Bank Malaysia Bhd* [2010] 5 CLJ 177; [2010] 5 MLJ 323 the Court of Appeal held that:

> Summary judgment procedure is a procedural device available for prompt and expeditious disposition of an action by a plaintiff or a counterclaim by a defendant, without a trial when there is no dispute as to the fact and law.

**[47]** The burden is always on the plaintiff to show that it has a clear and undeniable claim against the defendant and summary judgment can be allowed on the basis that the facts established in the pleading clearly show there is no triable issues to warrant a full trial. See: *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544; [2006] 2 MLJ 685.

**Whether There Is Triable Issue**

**[48]** It is not disputed that the plaintiffs' claims are all based on the CPO and CPB with the stated amount therein. The only issue related to these documents is whether by a clause "I/We hereby declare that I/we am/are aware that this order does not bind GENNEVA until it is accepted in writing by GENNEVA", means there is no evidence of any binding contract between the plaintiffs and the defendant.

**[49]** We had considered this issue. It is not disputed that all the CPOs are offers made by the plaintiffs and followed by payments into the defendant's bank account and some by partly giving gold at an agreed value. The defendant accepted the payments but did not reject the payments neither returned the payments. Instead, the defendant kept the payments and used them to the defendant's benefit. At the same time, the plaintiffs were not given what was promised for the said payments.

**[50]** It is trite law that apart from writings, conduct of parties may amount to acceptance. A

**[51]** In *Eckhardt Marine GMBH v. Sheriff Mahkamah Tinggi Malaya & Ors* [2001] 3 CLJ 864, at p. 869 para d, Gopal Sri Ram JCA held as follows:

> Fourthly, the act of acceptance may be either by words or by conduct or it may be partly by words and partly by conduct. *Brogden v. Metropolitan Railway Co* [1877] 2 App. Cas. 666 is a case of acceptance by conduct. B
>
> So much for what we consider to be the applicable law.
>
> In the present instance, there is no doubt that the Sheriff's advertisement amounted to an invitation to treat. It is the appellant who made a conditional offer by way of its letter in question. The Sheriff clearly accepted the appellant's offer. He did so by words and by conduct. He applied to the judge for leave to sell. He ensured satisfaction of the appellant's conditions by obtaining confirmation from the relevant authority. The learned judge undertook a careful scrutiny of the evidence and came to the conclusion that there was a valid and binding contract between the parties. We were unable to detect any error in his reasoning and we found no difficulty whatsoever in upholding his judgment. C D

**[52]** The Court of Appeal judgment above was followed by Mary Lim J in *JNA Ikhtisas Sdn Bhd v. Kerajaan Malaysia* [2015] 3 CLJ 1100, at paras. 31, 32 of the case, Her Ladyship went on to say: E

> [31] … Although there is no formal contract entered between the parties, the elements of offer, acceptance and consideration necessary for the formation of a contract are clearly present. The offer was made by the defendant which was accepted by the plaintiff.
>
> [32] These findings accord with the principles as discussed in the Court of Appeal's decision in *Eckhardt Marine GMBH v. Sheriff Mahkamah Tinggi Malaya & Ors* [2001] 3 CLJ 864. In that case, the Court of Appeal agreed with the findings of the court of first instance that there was a valid and binding contract. In coming to its decision, the Court of Appeal found it "appropriate to utilise this opportunity to set out the propositions of law that govern this area" … F G
>
> Fourthly, the act of acceptance may be either by words or by conduct or it may be partly by words and partly by conduct. *Brogden v. Metropolitan Railway Co* [1877] 2 App. 20 Cas. 666 is a case of acceptance by conduct …
>
> [35] **The fact that there is no formal contract is irrelevant.** It is not the defendant's case that the parties had agreed that there would be no binding contract until and unless a formal contract had been executed; or that this was a subject to contract arrangement between the parties. See *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625; *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprise Sdn Bhd* [1994] 3 CLJ 133. Even accepting for a moment that the understanding was for a formalisation of contractual arrangements, as opined by the Court of Appeal in *Charles* H I

*Grenier Sdn Bhd v. Lau Wing Hong* at p. 633, it is for the court to "construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties"; that "an agreement to make an agreement does not result in a contract". It was the court's view that:

> Unless the approach we have stated is adopted, a party to a contract who, after having concluded his bargain, entertains doubts as to the wisdom of the transaction may be in an unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. Businessmen would find the law to be huge loop-hole and commerce would come to a virtual standstill.
>
> The law leans in favour of upholding bargains and not in striking them down willy-nilly.

[36] Specifically, in the Supreme Court decision in *Ayer Hitam Tin Dredging Malaysia Sdn Bhd v. YC Chin Enterprise Sdn Bhd*, the court expressed at p. 141 that:

> It is well settled that when, an arrangement is made "subject to contract" (see *Rossdale v. Denny* [1921] 1 Ch 57) or "subject to the preparation and approval of a formal contract" (see *Winn v. Bull* [1877] 7 Ch D29) and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless and until a formal contract is exchanged.

[37] Quite aside from the fact that this is not what the case is about, there is no evidence that the parties intended that there be no contract until and unless a formal agreement had been drawn up and signed between the parties and a letter of award issued. The evidence points to the contrary. As mentioned earlier, under its original arrangements, the defendant clearly intended the plaintiff to render services under a direct negotiated contract. That arrangement meant that the plaintiff would be paid directly by the defendant; and not by the contractor awarded the design and build contract. Since there is proof that the plaintiff has rendered the services requested by the defendant, the defendant must therefore pay for those services.

**[53]** Similarly in *Nowran Begam Mohamed Saliff v. Nantha Kumar Devar Sangaran & Anor; CTRM Aviation Sdn Bhd (Third Party)* [2016] 7 CLJ 760, para. [110], His Lordship said the following words:

> [110] In the present case, when the entire series of correspondence between the parties and the conduct of parties is considered, I would agree with the contention of counsel for the third party that whilst the lease agreement was never executed, parties had nevertheless proceeded on terms of the last concluded contractual terms between the parties immediately prior to or upon the second defendant taking delivery of the aircraft, and those terms are contained in the final draft lease agreement. My finding is further fortified by the fact that the third party had *vide* letter

dated 19 March 2009 requested the second defendant to execute the lease agreement within seven days from the acceptance of delivery of the aircraft, failing which the agreement as per the terms of the final draft shall be deemed to be in force with immediate effect. The second defendant did not sign the agreement within the seven days, or at any date subsequent to it. If the second defendant was not agreeable to the terms of the draft agreement, then the second defendant ought to have rejected delivery of the aircraft. Instead, not only did the second defendant accept delivery but used the aircraft for its intended purpose. It is trite that, the act of acceptance of a contract may be either by words or by conduct or it may be partly by words and partly by conduct. See *Brogden v. Metropolitan Railway Co* (1877) 2 App Cas 666 which was referred to by the Court of Appeal in *Eckhardt Marine GMBH v. Sheriff Mahkamah Tinggi Malaya & Ors* [2001] 3 CLJ 864; [2001] 1 MLJ 49. Thus, in law the second defendant would by the series of correspondence and its conduct be deemed to have accepted the terms of contract as contained in the final draft lease agreement and therefore a binding agreement in those terms would be in force. The second defendant and the third party would be bound by the terms of the final draft lease agreement. In this regard, I would hold that though the final draft agreement was not executed, the terms of the final draft agreement would bind the parties and the second defendant by its conduct of having taken delivery of the aircraft would be deemed to have accepted the contractual terms in the draft agreement.

**[54]** In our view, the fact that the defendant having accepted the offers which followed by payments into the defendant's bank account and some by partly giving gold at an agreed value and used them for defendant's benefit, the defendant's conduct is consistent with having accepted the offers made by the plaintiffs. By the defendant's own conduct, the defendant is therefore estopped from denying that there is a valid and binding contract between defendant and the plaintiffs.

**[55]** At paras. [16] and [17] of the grounds of judgment, the learned judge made the followings findings:

[16] Daripada fakta yang dinyatakan tersebut, jelaslah bahawa sebagai satu entity yang menjalankan perniagaan jual beli emas, defendan telah memasuki kontrak dengan Plaintif-Plaintif apabila menerima wang pembelian emas dan emas yang hendak djual daripada Plaintif-Plaintif. Walaupun terdapat ungkapan "I/We hereby declare that 1/We am/are aware that this Order does not bind GENNEVA until it is accepted in writing by GENNEVA" pada sebahagian CPO, ianya tidak menghalang kewujudan suatu kontrak yang sah di antara Plaintif-Plaintif dan defendan walaupun defendan belum menyatakan persetujuan jual beli secara bertulis. Lagi pun, tindakan defendan yang tidak memulangkan wang atau emas yang di terima daripada Plaintif-Plaintif menunjukkan wujud kontrak melalui kelakuan (contract by conduct).

A [17] Defendan tidak boleh bergantung kepada alasan belum beri persetujuan secara bertulis kerana kelakuan defendan sendiri mengesahkan persetujuan tersebut. Dengan itu, isu pertama bukanlah isu yang perlu dibicarakan.

**[56]** We were unable to detect any error in his reasoning and we found no B difficulty whatsoever in upholding the learned judge's judgment. The learned High Court Judge was correct to say that this is not a triable issue.

**[57]** On the second issue, the learned judge addressed this issue at para. [18] of the grounds of judgment.

C [18] Bagi isu kedua, defendan menyatakan bahawa tindakan Plaintif-Plaintif dihalang di bawah undang-undang dengan merujuk kepada subseksyen 54(3) AMLA. Sebaliknya, Plaintif-Plaintif di dalam AS ("Afidavit Sokongan") masing-masingnya telah mengemukakan surat permohonan peguam mereka kepada Peguam Negara Malaysia dan juga surat persetujuan Pendakwa Raya bagi membenarkan Plaintif-Plaintif D mengambil tindakan sivil terhadap defendan melalui eksibit yang ditandakan "A-1". Daripada penelitian ke atas eksibit "A-1" jelaslah bahawa Plaintif-Plaintif telah pun memenuhi kehendak awalan di bawah undang-undang yang memerlukan persetujuan daripada Pendakwa Raya sebelum memulakan tindakan sivil terhadap defendan. Jelaslah bahawa isu kedua yang dibangkitkan defendan juga bukanlah satu isu yang perlu E dibicarakan.

**[58]** We found there is nothing wrong with the learned judge's judgment on this issue. The defendant relied on the High Court case of *Genneva Malaysia Sdn Bhd v. Abdul Ghani bin Sher Mohamad* (*supra*) which followed the case of *Daud bin Mohamad & 8 Ors. v. Geneva Malaysia Sdn Bhd & 4 Ors.* (*supra*). In F *Geneva*'s case, the learned judge was persuaded by the defendant's argument that the plaintiffs' claim is premature and/or statute-barred for non-compliance of s. 54(3) of the AMLATFA as the plaintiff has not obtained the Public Prosecutor's consent to file this suit.

**[59]** Contrary to the fact of this case, in this case, the plaintiffs had obtained G the requisite consent under s. 54(3) of AMLA which is at exh. "A-1" dated 8 June 2018 (at pp. 211 to 217 of Rekod Rayuan Bahagian C). The Public Prosecutor has given the consent under s. 54(3) of AMLA for the plaintiffs to initiate civil claim against the defendant for the amount claim in their letter dated 10 July 2018 (at pp. 218 to 219 of Rekod Rayuan Bahagian C). H The plaintiffs commenced this action on 25 July 2018 after obtaining such consent. Therefore, the consent issue as raised by the defendant is clearly not a triable issue.

**[60]** Be that as it may, having referred to the cases cited related to the issue, we were more inclined to agree with Mohamad Arif Yusof J in *Dato' Zahari* I *Sulaiman v. Genneva Sdn Bhd* (*supra*) which in our view is the correct interpretation of s. 54(3). His Lordship in allowing summary judgment to be

entered explained that s. 54(3) of AMLA cannot be read the way the defendant wants it to be read, for to do so will interfere with the general fundamental right of a citizen to resort to court process and access to justice for the determination of his dispute. Section 54(3), as presently worded, cannot be reasonably interpreted as imposing a general restraining order on all suits, actions or proceedings as against all litigants or potential litigants, and irrespective of the properties seized. To read this provision as imposing a kind of restraining order on legal process generally will, in my view, fall foul of s. 17A of the Interpretation Acts 1948 and 1967.

**[61]** Finally, on the issue of 'laches' raised by the defendant, it was submitted that the plaintiffs filed this suit almost six years after the date of the alleged breach by the defendant without any explanation for the long delay citing the case of *Lim Chiew v. Lee Chao Yong & Anor & Another Appeal* [2018] 1 LNS 1025.

**[62]** We noted, the plaintiffs had submitted that there is a shift now from the pleading of filing close to limitation period to after limitation period. We agreed with the plaintiffs that the claim has been made well within the prescribed period by law. The defendant's only substantive defence is the seizure under AMLA. It was stated in the defence that the defendant's bank account was frozen by an order from Bank Negara on 1 October 2012 and Public Prosecutor on 21 December 2012. But, the claims by the plaintiffs are not for the properties under seizure. We agreed with the plaintiffs that the seizure does not affect the defendant's liability to the plaintiffs.

**[63]** The learned judge acknowledged this on the grounds of judgment that limitation to bring an action is provided under the Limitation Act 1953. As long as the plaintiffs' cause of action is still within the permitted time, the principle of laches does not apply. The learned judge also of the view that the case of *Lim Chiew v. Lee Chao Yong & Anor And Another Appeal* (*supra*) relied by the defendant is not relevant to the issue at hand. In that case, the delay is related to an application to move a motion in court while, the plaintiffs' claim against the defendant is based on cause of action is still valid and enforceable. The situation in this case is different. The learned judge held that the issue of "laches" is not an issue that merits for a full trial. (See: para. [19] of the grounds of judgment).

**[64]** We have nothing to disagree with the learned judge's finding of this matter.

**The Plaintiffs Had A Clear And Undeniable Claim**

**[65]** The plaintiffs' affidavits respectively proved that the plaintiffs bought the gold from the defendant by producing the CPO and payment by cheques paid into the defendant's account (CPO and CPB are at pp. 221 to 241 and copy of cheques are at pp. 222, 238, 239, 240). All the documents had been exhibited in the affidavits.

**[66]** The CPO and CPB related to individual plaintiff show the amount stated therein are as follows:

First Plaintiff - RM405,500.00
– CP0228138 dated 16.8.2012 - RM100,500.00
– CP0318015 dated 29.8.2012 - RM105,000.00
– CPB00089972 dated 7.9.2012 - RM200,000.00

Second Plaintiff - RM271,700.00
– CP0318020 dated 24.8.2012 - RM271,700

Third Plaintiff - RM412,050.00
– CP0236664 dated 24.8.2012 - RM367,750.00
– CP0236665 dated 19.9.2012 - RM109,000.00

Fourth Plaintiff - RM535,600.00
– CP0316981 dated 22.8.2012 - RM535,600.00

Fifth Plaintiff - RM52,250.00
– CP0238557 dated 28.8.2012 - RM52,250.00

Sixth Plaintiff - RM108,500.00
– CP0250984 dated 10.9.2012 - RM108,500.00

Seventh Plaintiff - RM109,000.00
– CP0250985 dated 21.9.2012 - RM109,000.00

Eight Plaintiff – RM132,000.00
– CP0382841 dated 1.10.2012 - RM132,000.00

Ninth Plaintiff - RM109,000.00
– CP0382827 dated 21.9.2012 - RM109,000.00

**[67]** The affidavits had sufficiently established that the defendant had accepted the payment for the gold transactions or accepted the gold sold to the defendant but failed to carry out its responsibility under the contract, it follows that the defendant must refund the monies paid or return the gold back to the plaintiffs. We agreed with the learned judge's finding and that even if the gold which belonged to the first, second, third, fourth and sixth plaintiffs were seized by BNM, the defendant was still responsible to refund the value of the gold to the plaintiffs.

## Conclusion

**[68]** We found there is no triable issue in the plaintiffs' application for summary judgment on the claim against the defendant that merit a full trial. It is our unanimous decision that the appeal is dismissed with costs of RM10,000 subject to allocatur. The High Court decision is affirmed.